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8 UNITED STATES BANKRUPTCY COURT
9 NORTHERN DISTRICT OF CALIFORNIA
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11 IN RE:) Case No. 09-51900 ASW
12 BENYAM and PAULA R. MULUGETA,) CHAPTER 11
13 Debtors.) Date: July 1, 2009
14) Time: 1:45 p.m.
15) Room: 3020
16) Place: United States Bankruptcy Court
280 S. First St. Room 3020
San Jose, CA 95113
17) Judge: The Honorable Arthur Weissbrodt

18 **MEMORANDUM OF POINTS AND AUTHORITIES RE: MOTION TO SELL REAL**
19 **PROPERTY ("Harrison") FREE AND CLEAR OF LIENS**

20 Debtors Benyam and Paula R. Mulugeta ("Debtors") submit the following
21 memorandum of point and authorities in support of their motion to sell Debtors' real
22 property commonly known as 2332 Harrison Street, Oakland, CA (Assessor Parcel Number
23 (A.P.N.) 010-0769-005-00 ("Merrit Hotel" or "The Property"), and as described herein,
24 pursuant to Bankruptcy Code 363 (f), 363 (f)(1), (2), (4), and (5), Bankruptcy Code 506, 506
25 (d), and Bankruptcy Rule 6004, free and clear of all liens as follows:

26 **I. Summary.**

27 ¹Debtors and Debtors' counsel recognize Merritt is spelled incorrectly throughout, but has done
28 so purposely to match the spelling contained in the Purchase Agreement.

MEMORANDUM OF POINTS AND AUTHORITIES RE: MOTION TO SELL REAL PROPERTY ("Harrison") FREE AND CLEAR OF
LIENS

1 In summary, this is a motion by Debtors to sell Debtors' real property commonly
2 known as 2332 Harrison Street, Oakland, CA to Trading Spaces, LLC for \$7,000,000.00
3 pursuant to a Commercial Property Purchase Agreement And Joint Escrow Instructions
4 dated February 12, 2009 ("Purchase Agreement").

5 Pursuant to this motion Debtors seek an order (1) finding that the notice of the motion
6 was proper and adequate given the circumstances; (2) authorizing Debtors to sell real
7 property commonly known as 2332 Harrison Street, Oakland, CA (Assessor Parcel Number
8 (A.P.N.) 010-0769-005-00 ("Meritt Hotel" or "The Property") free and clear of liens
9 pursuant to Bankruptcy Code 363 (b) and (f), Bankruptcy Code 506, 506 (d), and
10 Bankruptcy Rules 6004 and 3012 to Trading Spaces, LLC ("Buyer" or "Trading Spaces")
11 for \$7,000,000.00 pursuant to a Commercial Property Purchase Agreement And Joint
12 Escrow Instructions dated February 12, 2009 ("Purchase Agreement"); (3) approving the
13 sale as the highest and best offer; (4) authorizing Debtor to enter into and approving the
14 Purchase Agreement and to undertake such other actions as may be reasonably necessary to
15 complete the sale; (5) a finding that the purchaser is in good faith and entitled to the
16 protections of Bankruptcy Code 363 (m); (6) authorizing the Debtors to pay from the
17 proceeds the amounts owed to secured liens which are not in dispute and authorizing the
18 Debtors to file or record termination statements, instruments of satisfaction, releases of liens
19 and any other documents necessary for the purpose of documenting the release of specified
20 liens; and (7) reserving bankruptcy court jurisdiction to implement the sale, enforce the sale
21 order, or resolve any disputes with or related to the sale.

22 **II. Introduction And Statement of Facts.**

23 Debtors are the owners of seven (7) distinct residential and commercial properties,
24 generally described as follows:

25 *Harker (Debtors' residence-a 5 bedroom 3 bath property located in Palo Alto);

26 *Harrison (a 5 story, 156 room hotel located in Oakland);

27 *Grand (a four story 21-unit apartment building with associated commercial units);
28

1 *O'Keefe (a 21-unit apartment building located in East Palo Alto);
2 *Chaucer (2 single family homes (duplex) located in Berkeley);
3 *Sevier (a single family residence located in Menlo Park used as a rental property); and
4 *Brann (a single family home used as a rental).

5 Debtors commenced this bankruptcy because the conversion the hotel at Harrison
6 increased Debtors' debt, impacted their cash flow, and drained resources.

7 Harrison was purchased by Debtors' in approximately April 2002 for \$4,100,000.
8 Thereafter, in order to maximize the potential value of the hotel and property, Debtors'
9 investigated several options which were subject to the City of Oakland's restrictions.
10 Debtors' elected to develop the Harrison hotel to a similar, albeit slightly different use, but
11 the City of Oakland required the property to be empty for one year. Debtors pursued this
12 development opportunity in light of the potential return on the investment and increase to the
13 property's value. The cost of this development and the vacancy required by the City of
14 Oakland impacted Debtors' income, cash flow at all properties, and drained resources.

15 **A. Bankruptcy.**

16 Debtors commenced this case on March 18, 2009 and first retained counsel on April 2,
17 2009.

18 **B. Sale of Harrison/Meritt Hotel.**

19 Pre-petition Debtors entered into a contract to sell the Harrison property for \$7,000,000
20 to Trading Spaces, LLC, an operator of assisted living facilities, as part of series of real
21 estate purchases by Trading Spaces, LLC and with an appraised "as is" value of \$8,100,000
22 and a projected value after renovation at \$14,310,000 (April 17, 2009). Debtors believe that
23 Trading Spaces, LLC has the ability to close this transaction. This transaction is part of
24 series of real estate purchases by Trading Spaces, LLC, in connection with Argent Asset
25 Management Inc. with a total monetary value of \$81,000,000 for the six purchases.

26 Debtors have continued progress towards closure of this transaction.

27 Debtor's counsel has spoken directly with Buyer's broker and confirmed that funding is
28

1 no longer a contingency, remaining contingencies should be formally removed by June 2,
2 2009, and the matter is moving towards closing and should close promptly. Debtors' counsel
3 has also spoken the buyer's financier and confirmed that the buyer's funding was approved
4 and the transaction moving towards closure.

5 Debtors' business is real estate and, as indicated above, own and operated several
6 commercial properties in the Bay Area. Debtor Benyam Mulugeta is also a real estate
7 professional. Debtors, pre-petition and post-petition investigated the marketing and sale of
8 their properties to determine value and in order to pay their creditors. In addition, Debtors
9 considered various proposals for the purchase or lease of their properties for purposes of
10 determining potential value and in order to pay their creditors.

11 The price and terms of the Purchase Agreement appear commercially reasonable and
12 for reasonable value and is the highest and best offer for prompt payment to creditors. Buyer
13 appears ready, willing, and able to perform on the Purchase Agreement.

14 In February 2009, Debtors received a similar purchase offer at \$9,000,000, subject to
15 other terms and conditions relating to construction costs. Debtors were in contract, the first
16 transaction appeared superior, and the first transaction's buyer appeared to have the ability to
17 close and had secured financing. In addition, Debtors have negotiated, but not accepted, the
18 terms of a potential long term lease of Harrison, to the Veterans Association ("VA") and to
19 another party (also a potential purchaser). The potential terms of a lease opportunity would
20 allow Debtors to maintain ownership of the property, receive approximately \$500,000 in
21 cash, become cash flow positive, propose a plan to reorganize their debts, and exit
22 bankruptcy.

23 C. Secured Claims.

24 At the time of commencement of this case and according to Debtors' schedules and
25 other information, Debtors appeared to have the following secured claims relative to The
26 Property:

27 (1) Lone Oak Fund, LLC	\$3,500,000.00
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1	(2) Robert Taylor	\$ 200,000.00
2	(3) Tomoko Nakama	\$ 185,000.00
3	(4) Aglala Panos	<u>\$ 250,000.00.</u>
4	Estimated Total ² :	\$4,135,000.00

5 **D. Consent From Secured Creditors.**

6 Debtors submit that the creditors claiming secured claims will consent, will not object,
7 and will be paid. Debtors do not anticipate any objections from any of the secured creditors.

8 **III. The Sale Complies With Bankruptcy Code 363 (b), (f), Is For Fair Value, Is In Good**
9 **Faith, And Is In The Best Interest Of The Creditors.**

10 **A. The Court Has The Authority To Authorize The Sale Of Debtor's Assets Free And**
11 **Clear Of Liens.**

12
13 Bankruptcy Code 363(f) provides that a trustee or debtor-in-possession, after notice and
14 a hearing, may sell property free and clear of any other entity's interest in such property, if:

15 (1) applicable non-Bankruptcy law permits sale of such property free and clear of such
16 interest; (2) such entity consents; (3) such interest is a lien and the price at which such
17 property is to be sold is greater than the aggregate value of all liens on such property; (4)
18 such interest is in bone fide dispute; or (5) such entity could be compelled, in a legal or
19 equitable proceeding, to accept a money satisfaction of such interest.

20 The provisions of Bankruptcy Code 363(f) are disjunctive, thus a sale free and clear of
21 the concerned interest may be permitted if any one of the conditions are met. In addition,
22 courts have long recognized that court's have the power to authorize the sale of property free
23 of liens with the liens attaching to the proceeds, without the consent of the lienholder. (Ray
24 v. Norseworthy, 90 U.S. (23 Wall. 128 (128) (1875)).

25 Debtors believe the proceeds of a sale pursuant to the Purchase Agreement will satisfy
26 the claims of the parties claiming secured claims against The Property and a sale of The

27 _____
28 ²These figures are estimated.

Property satisfies each, most, or all of the disjunctive provisions of Bankruptcy Code 363(f).

**B. The Sale Of The Debtor's Business And Assets Is For Fair Value
And In The Best Interest Of The Creditors.**

In determining whether to approve a propose sale under Bankruptcy Code 363, courts generally apply the business judgment test. (In re Condere, 225 B.R. 334 (Bankr. E.D. Mich. 1997) Some court's described the standard as one of 'good faith', 'best interest of creditors', or 'fair and reasonable, but does not require the highest bid. ((In re Condere, 225 B.R. 334 (Bankr. E.D. Mich. 1997); In re Phoenix Steel Corp., 82 B.R. 334 (Bankr. D. Del. 1987); WBQ P'ship v. Commonwealth of Virginia Dep't of Medical Assistance Servs., 189 B.R. 97 (Bankr. E.D. Va. 1995); and In re Delaware & Hudson Railway Co., 124 B.R. 169 (D. Del. 1991)).

Debtor submits that the Purchase Agreement and the identified sale is for fair value, in the best interest of creditors, fair and reasonable, and in good faith.

C. Anticipated Distribution Of Sale Proceeds.

Debtors anticipate the follow distribution of sale proceeds paid from escrow, subject to confirmation of amounts owed to secured claims (subject to various closing costs and any priority tax claims):

(1) Lone Oak Fund, LLC	\$3,500,000.00
(2) Robert Taylor	\$ 200,000.00
(3) Tomoko Nakama	\$ 185,000.00
(4) Aglala Panos	<u>\$ 250,000.00.</u>
Estimated Total ³ :	\$4,135,000.00

The net sale proceeds are to be held by Debtors' counsel ("Trust Money") subject to those deeds of trusts and liens of record asserted against Debtors, in favor of such claimants in order of recordation of their liens, subject to further order of the Bankruptcy Court.

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³These figures are estimated.

1 **III. Conclusion.**

2 Debtors respectfully request an order an order (1) finding that the notice of the motion
3 was proper and adequate given the circumstances; (2) authorizing Debtors to sell real
4 property commonly known as 2332 Harrison Street, Oakland, CA (Assessor Parcel Number
5 (A.P.N.) 010-0769-005-00 (“Merrit Hotel” or “The Property”) free and clear of liens
6 pursuant to Bankruptcy Code 363 (b) and (f), Bankruptcy Code 506, 506 (d), and
7 Bankruptcy Rules 6004 and 3012 to Trading Spaces, LLC (“Buyer” or “Trading Spaces”)
8 for \$7,000,000.00 pursuant to a Commercial Property Purchase Agreement And Joint
9 Escrow Instructions dated February 12, 2009 (“Purchase Agreement”); (3) approving the
10 sale as the highest and best offer; (4) authorizing Debtor to enter into and approving the
11 Purchase Agreement and to undertake such other actions as may be reasonably necessary to
12 complete the sale; (5) a finding that the purchaser is in good faith and entitled to the
13 protections of Bankruptcy Code 363 (m); (6) authorizing the Debtors to pay from the
14 proceeds the amounts owed to secured liens which are not in dispute and authorizing the
15 Debtors to file or record termination statements, instruments of satisfaction, releases of liens
16 and any other documents necessary for the purpose of documenting the release of specified
17 liens; and (7) reserving bankruptcy court jurisdiction to implement the sale, enforce the sale
18 order, or resolve any disputes with or related to the sale.

19 Dated: May 29, 2009

CAMPEAU GOODSSELL SMITH

20 /s/ William J. Healy

21 William J. Healy

22 Attorneys For Debtors
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